NO. SC86699

IN THE MISSOURI SUPREME COURT

NICHOLAS OLVERA, Respondent, and
TINA OLVERA, Respondent-Cross Appellant

vs.

KELLY FRITTS, Appellant-Cross Respondent.

Appeal from the Circuit Court of Bates County, Missouri
27th Judicial Circuit, CV199-228CC
Honorable William J. Roberts

SUBSTITUTE BRIEF OF APPELLANT-CROSS RESPONDENT KELLY FRITTS

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JURISDICTIONAL STATEMENT

This appeal is before this Court pursuant to an Order of transfer from the Court of Appeals, Western District, dated March 29, 2005. The appeal arises from the jury trial of a case involving a collision between a man riding on horseback, and a pedestrian. The accident occurred in Rockville, Missouri, on August 9, 1998. The case proceeded to trial on Tuesday, October 28, 2003, in the Circuit Court of Bates County. The jury entered its verdict on Friday, October 31, 2003. Defendant filed a timely Motion for Remittitur or for New Trial, which was denied.

This appeal was originally filed in the Missouri Court of Appeals, Western District. Jurisdiction was proper in that Court because the appeal involved claims of evidentiary and instructional errors at trial, and did not involve any issue or other matter that would deprive the Court of Appeals of jurisdiction.

The Court of Appeals issued its Memorandum Opinion on February 1, 2005. A copy of the Memorandum Opinion is included in the appendix to this brief, pp. A3-A14. As can be seen from the opinion, the Court of Appeals dismissed the appeal, holding that the Court had no jurisdiction because appellant Fritts did not pay the $20.00 surcharge required by §488.031.1 R.S.Mo. within the time required to file his Notice of Appeal. The Court of Appeals held that the $20.00 surcharge was part of the docket fee required by Supreme Court Rule 81.04, and therefore, was a jurisdictional requirement for the appeal.

It is appellant's position that the Court of Appeals did have jurisdiction, that appellant paid the correct docket fee as required by Rule 81.04, and that the $20 surcharge was a separate

fee which was not a jurisdictional requirement. The following facts are applicable to this jurisdictional issue. Appellant Fritts filed his Notice of Appeal with the Circuit Court Clerk on December 29, 2003. (LF 121). At that time, without any question, Rule 81.04(c) provided that the appellate court docket fee was $50.00.[1] Appellant Fritts paid the $50.00 docket fee along with his Notice of Appeal. (See Western District Court of Appeals Case Record, included in the Appendix, pp. A15-A16). The Notice of Appeal was accepted by the circuit court clerk, and forwarded to the Court of Appeals. (LF 121). The Case Records which were issued by the Court of Appeals indicate that the filing fee was paid on December 29, 2003, and that the trial court was to collect a "$20.00 Basic Legal Service Fee." (See Appendix, p. A15).

On January 5, 2004, the trial court noted in its docket sheet that "Terry from Missouri Court of Appeals called, filing fee is now $70.00, when receive additional funds please forward copy of receipt, wrote [Fritts' attorney] requesting additional $13.00 for filing fee." (LF 121). It appears from the trial court's docket sheet that the law firm representing appellant Fritts had a $7.00 credit with the trial court clerk's office, which was applied towards the $20.00 surcharge, leaving a balance due of $13.00. (LF 121). Appellant Fritts paid the remaining $13.00 on January 8, 2004. (LF 121). The trial court noted the payment, and wrote in its docket sheet: "Received from Fritts' attorney $13.00 additional filing fee. Applied open items

[1] On July 1, 2004, the docket fee was increased to $70.00. Rule 81.04(c).

to filing fee for appeal." (LF 121). As a result, the $20.00 surcharge was paid in full on January 8, 2004. (LF 121). On January 6, 2004, the Court of Appeals made formal acknowledgment of the Notice of Appeal through a letter which was sent by Terence G. Lord, Clerk, stating "I hereby acknowledge receipt of the Notice of Appeal in the above cause." (See Appendix, p. A18). Respondent/Cross-Appellant Tina Olvera filed her Notice of Cross Appeal on January 8, 2004. (LF 121).

The original briefing schedule was issued, and Respondent/Cross-Appellant Tina Olvera was ordered to file her brief first, on or before June 1, 2004. (Appendix, p. A16). However, the parties stipulated to changing the briefing schedule, so that appellant Fritts would file his brief first. (Appendix, p. A19). Appellant Fritts filed his brief on July 1, 2004 Prior to that time, neither the Court of Appeals, nor the respondents, raised any issue with the $13.00 remaining balance on the surcharge being paid after appellant's Notice of Appeal was due. There was no Motion to Dismiss filed by respondents. The appeal was accepted, and proceeded as though the docket fee was paid on time, and the Court of Appeals had jurisdiction for the appeal. The issue regarding payment of the

$13.00 remaining balance on the surcharge was not raised until respondent's brief was filed, on July 30, 2004.

Appellant believes that the Court of Appeals was wrong in holding that the surcharge required by § 488.031.1 RSMo. was a jurisdictional requirement for an appeal. In arriving at that decision, the Court of Appeals overlooked several statutes included within Chapter 488 of the Missouri Revised Statutes on Court Costs, which clearly distinguish between fees and surcharges. The Court of Appeals also overlooked several statutes included within Chapter 488 which provide that the payment of surcharges and court costs can be waived. In addition, the Court of Appeals misinterpreted Kattering v. Franz, 231 S.W.2d 148 (Mo. 1950).

Before addressing Chapter 488 RSMo., it is first necessary to emphasize that at the time appellant Fritts filed his Notice of Appeal on December 29, 2003, Supreme Court Rule 81.04(c) stated as follows:

> **(c) Docket Fees.** The appellate court docket fee is fifty dollars. It shall be paid to the trial court clerk when the notice of appeal is filed. The trial court clerk shall remit the docket fee to the appellate court clerk or as otherwise provided by law.
>
> No trial court clerk shall accept or file a notice of appeal unless:
>
> (1) The docket fee is deposited therewith; or
>
> * * *

Appellant Fritts paid the $50 docket fee along with his Notice of Appeal, which was accepted by the trial court clerk. Section 488.012.1 RSMo. provides that trial court clerks are

required to collect the court costs in the amounts authorized by supreme court rule. Therefore, the Supreme Court Rule overrides any statute, including § 488.031, which is the statute setting forth the $20 surcharge at issue. Appellant paid the docket fee required by Supreme Court Rule, within the applicable period of time, and therefore, his appeal was perfected on time, and the Court of Appeals had jurisdiction.

Chapter 488 - Court Costs

The assessment and collection of Court Costs is governed by Chapter 488 of the Missouri Revised Statutes. Section 488.010 includes the following definitions:

(1) **"Court costs",** the total of fees, miscellaneous charges and surcharges, imposed in a particular case;

(2) **"Fees",** the amount charged for services to be performed by the court;

* * *

(4) **"Surcharges",** *additional* charges allowed by law which are allowed for specific purposes designated by law. (Emphasis added).

As can be seen, the statute distinguishes between "fees" and "surcharges." The $20.00 cost in this case is clearly designated as a "surcharge" in § 488.031.2, where it states: "Court filing *surcharges* pursuant to this section . . . " Since the $20.00 is a surcharge, and not a fee, it cannot be deemed to be a jurisdictional "docket fee." Rather, it is an *additional* fee, which is *allowed* by law. It is not a required, jurisdictional, docket fee.

Several other statutes also distinguish the $20.00 surcharge from the $50.00 docket fee. The $50.00 docket fee was created by § 488.012.3(8). Paragraph 1 of that statute states as follows:

> Beginning July 1, 1997, the clerk of each court of this state responsible for collecting court costs shall collect the court costs authorized by statute, in such amounts as are authorized by supreme court rule adopted pursuant to sections 488.010 to 488.020. (Emphasis added.)

In other words, the legislature stated that the costs authorized by Sections 488.010 through 488.020 would be set by Supreme Court Rule, and the applicable court clerks were responsible for collecting those amounts. The surcharge at issue in this case was not set forth at §§ 488.010 through 488.020, but rather, was set forth at § 488.031, and therefore, was specifically excluded from the statute which required the applicable court clerks to collect the amount. Therefore, it was clearly distinguished from the $50.00 docket fee set forth in § 488.012.

Furthermore, the requirement that the $50.00 docket fee be paid with the Notice of Appeal is only set forth in Supreme Court Rule 81.04. However, Rule 81.04 does not mention the surcharge, and there is simply no statute, or rule, which requires that the surcharge be paid before an appeal can be docketed. In fact, the only amount which was required to be paid with the Notice of Appeal was the $50.00 docket fee.

The Court of Appeal's decision relies in part on the language of § 488.031.2 which states that "Court filing surcharges pursuant to this section shall be *collected* in the same *manner* as other fees, fines, or costs in the case." (Emphasis added). That language does not make the surcharge a jurisdictional prerequisite to filing an appeal. First, it only governs the *manner* in which the surcharge is to be collected. Second, there are many types of "fees, fines, or costs" which are clearly *not* jurisdictional. If the Court's reasoning were extended, then all "fees, fines, or costs" would be considered jurisdictional requirements to an appeal.

In summary, there is no statutory authority for the Court of Appeal's decision that the surcharge at issue must be paid before the appeal can be docketed. Rather, the court cost

statutes clearly distinguish between the surcharge, and a docket fee. In addition, the court cost statutes specifically delegate the collection of certain court costs to be governed by supreme court rule, and specifically exclude the $20.00 surcharge at issue in this case. Since the only requirement that the docket fee be collected before an appeal can be docketed is set forth in Rule 81.04, and the $20.00 surcharge was specifically excluded from that rule, the surcharge is not a jurisdictional requirement.

Waiver

The court costs statutes also specifically allow waiver of the surcharge, and all other court costs, by the circuit court or the court of appeals. In this case, payment of the outstanding $13.00 of the surcharge was waived by both the circuit court and the court of appeals.

Section 488.031.2 clearly states that the surcharge at issue in this case can be waived by the courts. The last sentence of the paragraph states:

> However, the additional fees prescribed by this section shall not be collected . . . when costs are waived or . . .

Rule 81.04 requires that the clerk of the trial court shall not accept or file a notice of appeal unless the $50.00 docket fee is paid with the notice. In this case the trial court accepted the notice of appeal on December 29, 2004, without full payment of the $20.00 surcharge. If the surcharge is to be considered part of the docket fee, as the Court of Appeals ruled, then the trial court waived full payment of that surcharge, as it was authorized to do by § 488.031.2. In addition, the clerk of the Court of Appeals also waived full payment of the surcharge on two

separate occasions. First, it accepted the December 29, 2004 filing date for the Notice of Appeal, without full payment of the surcharge. Then, when the surcharge was paid in full ten days later on January 8, 2005, the amount was accepted, and late payment was waived.

There are several appellate decisions which also state that the docket fee can be waived. State v. McFall, 561 S.W.2d 447 (Mo.App. S.D. 1978), cited with approval in State v. Mitchell, 128 S.W.3d 518, 520 (Mo.App.W.D. 2003). Appellant is aware of the holdings which state that the docket fee cannot be waived after the date on which the Notice of Appeal is due to be filed. See State v. Mitchell, supra. However, in this case, both the trial court and the court of appeals waived full payment of the surcharge on December 29, 2004, which was the date the Notice of Appeal was due to be filed, by accepting the Notice of Appeal on that date.

In addition, respondents also waived the issue, by filing a cross-appeal, and by failing to raise the issue by motion. In Hemphill v. City of Morehouse, 142 S.W. 817 (Mo.App. 1912), the appellant failed to file the abstract of the record on a timely basis. However, the respondent did not file a motion to dismiss. The Court of Appeals held that the issue was waived. The same holding applies to this case. Respondents did not file a motion to dismiss the appeal. Rather, they waited to raise the issue in their brief. By that time, it was too late for appellant to file a motion pursuant to Rule 81.07, requesting leave to extend the time to pay the remaining $13.00 of the surcharge until January 8, 2004 (the date it was paid). As stated in the Hemphill case: "[W]e will not tolerate counsel lying by until a case is called for hearing, or within a few days before that, and then spring a point, which if due opportunity had been afforded, could have been taken out of the case." Hemphill v. City of Morehouse, supra, 142

S.W. at 819. In this case, respondents waited to raise the surcharge issue until after the six months had passed, during which appellant could have attempted to cure the issue pursuant to Rule 81.07. As a result, the issue was waived.

Misinterpretation of case law.

It is also appellant's position that the Court of Appeals misinterpreted the holding of Kattering v. Franz, 231 S.W.2d 148 (Mo. 1950). That case held that the docket fee was jurisdictional, and did not even involve the surcharge at issue in this case. In addition, the primary reason for the this Court's decision in Kattering that the docket fee was jurisdictional, was to prevent delay in the appeal process. Kattering, supra, 231 S.W.2d at 149 - 150. In this case, appellant Fritts paid the surcharge immediately after being notified that it was due, and there was no delay whatsoever in the appeal. The date that respondent-appellant Fritts filed his Notice of Appeal was the date used for the briefing schedule and all other deadlines.

The application of simple logic and common sense is clearly in favor of appellant's position. Kattering holds that the docket fee is a jurisdictional requirement for filing an appeal. Rule 81.04(c) provided that the docket fee was $50.00. Appellant paid the $50.00 docket fee with his Notice of Appeal, on time. Section 488.031.1 required an additional surcharge of $20.00, for the basic civil legal services fund. That amount was paid in full by appellant on January 8, 2004. The surcharge was not treated as a docket fee by either the trial court or the Court of Appeals. The appeal was accepted, and docketed. The parties filed their briefs. There were no motions to dismiss. Appellant's appeal was timely filed. There is not one single statute or court rule which indicates otherwise.

Appellant understands that the Court of Appeal's decision was based in part on Deever v. Karsch & Sons, Inc., 144 S.W.2d 370 (Mo.App. S.D. 2004). The facts of that case were very similar to the facts at hand, except that Deever involved a worker's compensation proceeding, and in addition, it is important to note that the respondent filed a motion to dismiss the appeal, unlike the respondents in this case, and therefore the waiver issue was not present. However, it is appellant's position that the holding in Deever also misinterpreted the applicable statutes and the Kattering decision. Kattering only held that the docket fee was jurisdictional, and not the surcharge. The Court in Deever erred by extending the holding of Kattering to the surcharge at issue in this case.

Date of Judgment

Respondents have also taken the position that appellants post-trial motions, and Notice of Appeal, were filed out of time. This position is based on respondents' argument that the Judgment was entered by the trial court on October 31, 2003, when an entry was made in the trial court's journal, rather than the date on which the formal written Judgment was filed. The facts on this issue are as follows.

On October 31, 2003, the jury entered its verdict, finding that plaintiff was 20% at fault, defendant was 80% at fault, and the total damages for plaintiff Nicholas Olvera were in the amount of $1,000,000. (LF 19). On that same date, a docket entry was made which described the jury's verdict. (LF 22 - 23). The docket entry was signed by the trial judge (LF 23). However, the docket entry was never filed with the Court. (LF 22 - 23). The docket entry was not denominated as a "Judgment." (LF 23). The docket entry was not read in open court. (Tr.

674-76). Several days later, on November 3, 2003, counsel for the plaintiffs prepared a Judgment, and mailed it to the trial judge. (See Appendix, pp. A28-A30). The letter from plaintiffs' attorney to the trial court stated as follows:

> Enclosed is a Judgment for your consideration in the above referenced case. I am providing a copy to Mr. Karaim and would ask that he notify you if he has any objection to the form of the Judgment.

(See Appendix p, A28). Counsel for defendant did not object to the Judgment, and it was later signed by the trial judge, and filed with the Court on November 7, 2003. (LF 19).

Missouri Supreme Court Rule 74.01(a) states as follows:

> **(a) Included Matters.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment is rendered when entered. A judgment is entered when a writing signed by the judge and denominated "judgment" or "decree" is filed. The judgment may be a separate document or entry on the docket sheet of the case. A docket sheet entry complying with these requirements is a judgment unless the docket sheet entry indicates that the court will enter the judgment in a separate document. The separate document shall be the judgment when entered.

It is clear from the rule that a document entered by a trial court does not constitute a "judgment" unless it is: (1) a writing; (2) signed by a judge; (3) denominated "judgment"; and (4) filed. River Salvage, Inc. v. King, 11 S.W.3d 877,880 (Mo. App. W.D. 2000). In this case,

there is no indication whatsoever that the docket entry signed by Judge Roberts was filed with the Circuit Court. Therefore, it did not constitute a "judgment."

Another requirement of Rule 74.01 is that the written document purporting to be a judgment must be "denominated" as a judgment. This requirement in the rule was part of an amendment effective January 1, 1995. The impact of the amendment to the rule was addressed by this Court in City of St. Louis v. Hughes, 950 S.W.2d 850 (Mo. banc 1997). The Court stated that prior to the amendment of the rule, it was unclear when a pronouncement or judgment was a final judgment. The amendment clarified the rule by providing the express requirement that the document or docket entry be denominated as a "judgment." According to the Court, the denomination requirement created a "bright line" test for determining when a writing was a judgment. Id. at 853. The Court declared that in order to comply with revised Rule 74.01(a), it must be clear from the writing that the trial court is calling or designating the document or docket sheet entry a "judgment." Id. The Court referred to Webster's Third New International Dictionary, which defined "denominate" as "to give a name to: call by a name." The Court also referred to a similar definition contained in The American Heritage Dictionary, Second Edition. The Court then went on to hold: "Thus, the written judgment must be signed by the judge and must be designated a "judgment." (Emphasis added). Id. The Court also stated: "Depending upon the text, mere use of the word 'judgment' in the body of the writing or docket entry may not suffice." Id.

The issue of denomination was also addressed in Chambers v. Easter Fence Company, 943 S.W.2d 863, 865 (Mo. App. E.D. 1997). The issue in that case was whether the trial

court's written decision on the defendant's motion to dismiss, constituted a Judgment. The trial court's written decision was entitled "Memorandum & Order." In holding that the document did not constitute a Judgment under Rule 74.01, the Court of Appeals stated that, the term "denominated judgment" meant that the document or docket entry had to "labeled or titled as a judgment." Id. at 865.

It is undisputed that the docket entry involved in this case was not titled, labeled, or otherwise denominated as a "judgment." Therefore, it does not constitute a judgment under Rule 74.01.

In this case, counsel for plaintiffs provided the Judgment form to the trial judge. It was filed with the Court on November 7, 2003. Defendant filed his Motion For Remittitur or For New Trial on December 8, 2003, thirty days later. Plaintiffs filed their Suggestions in Opposition to Defendant's Motion For Remittitur or For New Trial on December 17, 2003. Those suggestions are included in the Legal File, beginning on page 83. In their Suggestions in Opposition, plaintiffs do not argue that defendant's Motion For Remittitur or For New Trial was filed out of time, and do not take the position or argue that the Judgment was actually entered on October 31, 2003, rather than November 7, 2003.

The hearing on post-trial motions took place on December 19, 2003. Again, the plaintiffs never raised the argument that defendant's Motion For Remittitur or For New Trial was filed out of time, and never raised the argument that the Judgment was entered on October 31, 2003, rather than November 7, 2003.

The appropriate time for plaintiffs to raise their argument that defendant's Motion For Remittitur or For New Trial was filed out of time, was in their Suggestions in Opposition to that motion, or during the hearing on that motion. By failing to do so, plaintiffs waived that argument, and are estopped from raising it at this point in the proceedings.

The issues of waiver and estoppel were addressed in River Salvage, Inc. v. King, 11 S.W.3d 877 (Mo. App. W.D. 2000). In that case the trial took place on June 27, 1995. Six months later, on December 29, 1995, the trial court issued its ruling, entitled "Findings of Fact, Conclusions of Law and Order." The appellant filed his motion for new trial, which was never disposed of by the trial court. As a result, the trial judge's decision became final 90 days later, on April 16, 1996. Unfortunately, the appellant failed to file his Notice of Appeal within 10 days after the decision became final. The appeal was dismissed, and the appellant filed a motion for leave to file a late notice of appeal, which was denied. Appellant then filed a motion for leave to appeal out of time, which was also denied. More than two years later, the trial court, at the request of appellant, issued a new ruling in the case, entitled "Judgment." Appellant then appealed from that Judgment in a timely manner. The issue on appeal was whether the appeal was timely. Appellant argued that the trial court's original order was not a final judgment because it was not denominated as a "Judgment." The Court of Appeals held that the appellant waived, and was estopped from raising that argument, because he did not raise the issue in a timely manner, primarily because appellant did not raise the issue in his motion for new trial. In addressing the issue of waiver, the Court cited to State ex rel. York v. Daugherty, 969 S.W.2d 223 (Mo. banc 1998), in which the Missouri Supreme Court recognized that

constitutional violations are waived if they are not raised at the earliest possible opportunity. The Supreme Court also declared that waiver occurs if the party affected had a reasonable opportunity to raise the issue by timely asserting the claim before a court of law, and failed to do so. River Salvage, supra, 11 S.W.3d at 881.

In this case, the principles set forth in the Daugherty case, and relied upon by the Court of Appeals in the River Salvage case, are applicable. Plaintiffs did not raise the argument that defendant's motion for new trial was untimely at the earliest possible opportunity, which was at the time they opposed that motion. Rather, they waited for nine months. In addition, plaintiffs actually submitted the Judgment to the Court for signature, which they now claim was invalid. By doing so, plaintiffs accepted the burdens and benefits of that judgment, and are estopped from arguing that judgment is invalid. River Salvage, supra, 11 S.W.3d at 881-82. Plaintiffs have also accepted the benefit of the November 7, 2003 Judgment by filing their Notice of Cross-Appeal on January 8, 2004.

Plaintiffs rely heavily on Kessinger v. Kessinger, 935 S.W.2d 347 (Mo. App. S.D. 1996). However, that case out of the Southern District is easily distinguished, because it involved a completely different set of facts. According to the decision, the docket entry consisted only of the words: "The Court enters Judgment in favor of [defendant] and [defendant] is ordered discharged w/ costs assessed against [plaintiff]." The trial judge then read his entry into the record in open court after the jury was excused. In this case, the docket entry included a complete recitation of the trial activities that day, and was clearly written after the trial was over, and the judge had left the bench. The docket entry was never read in open court. More

importantly, in the Kessinger case, the formal Judgment was not filed with the Court until after the plaintiff filed his motion for new trial. In this case, the plaintiffs provided a Judgment form to the trial judge on November 3, 2003, which was the Monday following the jury's verdict on Friday, October 31, 2003. Certainly, defendant was justified in relying on the Judgment form provided by plaintiffs, the next business day after the verdict, especially when the trial judge's docket entry was not announced in open court, was never mailed to the attorneys, and was never filed with the clerk of the circuit court.

In summary, the October 31, 2003 docket entry was not filed, and was not denominated as a "Judgment", as required by Rule 74.01. Therefore, it was not effective as an appealable judgment. Rather, the Judgment, which was provided to the trial court by plaintiffs, and filed on November 7, 2003, was a valid judgment, and defendant's Motion For Remittitur or For New Trial, as well as defendant's Notice of Appeal, were timely.

STATEMENT OF FACTS

This lawsuit arises from a collision between defendant Kelly Fritts, who was riding on horseback, and plaintiff Nicholas Olvera, who was a pedestrian. (LF 1). The accident occurred on August 9, 1998, at the Rockville Festival, in Rockville, Missouri. (LF1). Defendant Fritts testified at trial that he was riding his horse on the street towards a street dance where some deputy sheriffs were located in order to seek emergency medical assistance for his girlfriend, who had fallen off a horse several blocks away from the street dance. (Tr. 584 - 586). Defendant Fritts was riding at a gallop, but not at top speed for the horse. (Tr. 596 - 587). Cars were parked bumper to bumper along both sides of the street. (Tr. 587). As defendant Fritts was riding down the street, plaintiff Nicholas Olvera suddenly stepped out from between two parked cars, directly into the path of defendant Fritts and his horse. (Tr. 587 - 588).

Plaintiff Nicholas Olvera was not trampled by the horse, he was simply knocked down. (Tr. 459). After the accident, plaintiff sat on the curb, and was approached by several deputy sheriffs and defendant Kelly Fritts. (Tr. 461). Defendant Fritts asked if plaintiff was alright. (Tr. 462 - 263). Nicholas Olvera's wife then arrived, and the two of them walked through a field and down a hill to the location where defendant Fritts' girlfriend was lying injured on the ground. (Tr. 464 - 466). Plaintiff Nicholas Olvera was asked if he needed an ambulance, and he said "no." (Tr. 467). The plaintiffs then walked all the way back to their vehicle, and Nicholas Olvera drove to the hospital. (Tr. 467 - 468).

Plaintiff Nicholas Olvera's Medical Treatment and Other Claimed Damages

It is undisputed that plaintiff Nicholas Olvera did not sustain one single broken bone or fracture as a result of the accident. (See x-ray report, LF p. 45; See also, video taped deposition testimony of Dr. Casey, played to the jury on Wednesday, October 29, 2003, Tr. p. 274, and marked as Exhibit 11, p. 11, lines 13 - 17). The emergency room doctor, Rick Casey, D.O., testified that he treated plaintiff in the emergency room on August 9, 1998. (See Exhibit 11, Deposition of Dr. Casey, p. 7). Plaintiff's only complaints in the emergency room were that he received a laceration to his right upper lip, his right elbow was sore, his back was sore, and his buttocks were sore. (Exhibit 11, p. 8). The only treatment given in the emergency room was repair of the laceration with two stitches, and a prescription of Ultram for plaintiff's discomfort. (Exhibit 11, p. 9). A neurologic assessment was completely normal. (Exhibit 11, p. 16). Plaintiff was not confused, disoriented, did not have slurred speech, and was not knocked unconscious as a result of the horse accident. (Exhibit 11, p. 16). Dr. Casey's only diagnosis was a laceration to the upper lip with a left rib strain, and a bruise. (Exhibit 11, p. 17). Dr. Casey did not indicate or diagnose any back injury whatsoever. (Exhibit 11, p. 17).

On August 11, 1998, plaintiff saw Dr. Garwood at the Nevada Medical Center. Those medical records were admitted into evidence at trial as Exhibit 7, (Tr. 398), and are also included in the Legal File, beginning at page 48. According to Dr. Garwood's medical transcription on that date, plaintiff's shoulder appeared to be remarkable only for muscle bruising. There was no evidence of fracture or dislocation. Plaintiff's neck exhibited full

range of motion. There was no neurologic deficit. X-rays of the lumbar spine were ordered, and Dr. Garwood thought that plaintiff might have sustained a fracture, but that was later ruled out. (LF 48).

Plaintiff returned to Dr. Garwood on August 24, 1998. At that time Dr. Garwood prescribed physical therapy. Plaintiff underwent 10 physical therapy sessions from August 26, 1998, until September 15, 1998. (LF 62). Plaintiff returned to Dr. Garwood on August 31, September 8, and September 15, 1998. (LF 57). Dr. Garwood's notes from the September 15, 1998 visit state as follows:

> Nicholas will be returned to work following a program of work hardening and physical therapy. He believes that he is improved to such an extent that he will be able to work at Murphy farms without difficulty.

(LF 57). There is no medical record for any other medical treatment in the year 1998. (Plaintiff's Exhibit 7). The total treatment in 1998 consisted of an emergency room visit, another visit for the removal of two stitches, five visits to Dr. Garwood, and 10 sessions of physical therapy. (Plaintiff's Exhibit 7). The total amount of medical bills incurred in 1998 was $2,548.13. (See Plaintiff's Exhibit 25).

Plaintiff is also claiming that he was off work from August 10, 1998, until August 31, 1998. (Tr. 405). In addition, he is claiming that he missed work for physical therapy, for a total claim of 34.5 missed days of work. (See Plaintiff's Exhibit 26). The total amount of plaintiff's lost wages claim was $2,539.20.

In the year 1999, plaintiff only had four medical treatments, two of which involved requests for disability, and no medical treatment. (Plaintiff's Exhibit 7). There was no medical treatment whatsoever in January 1999. (Plaintiff's Exhibit 7) On February 8, 1999, plaintiff saw Dr. Garwood, for a disability determination, but received no treatment. (LF 57). Plaintiff did not see any doctors or receive any other medical treatment in March, April, May or June of 1999. (Plaintiff's Exhibit 7). On July 26, 1999, plaintiff visited Dr. Casey, but only for a disability determination. (See plaintiff's Exhibit 11, deposition of Dr. Casey, p. 19). On that date, plaintiff wasn't even on any medication for his alleged back complaints. (Exhibit 11, p. 19). Plaintiff did not see any doctors or receive any other medical treatment in August, September or November of 1999. (Plaintiff's Exhibit 7). On December 22, 1999, plaintiff saw Dr. Garwood with back complaints, but also stated that he had no problems during work, and that his back symptoms didn't bother him until after work. (LF 57).

Plaintiff did not see any doctor or seek any medical treatment for injuries sustained in the horse accident in January, February, March or April of 2000. (Plaintiff's Exhibit 7). On May 23, 2000, he visited Dr. Garwood to complaint about a worker's compensation injury. (LF 60). Dr. Garwood did not believe that plaintiff sustained a worker's compensation injury, and instead, believed that plaintiff had only sustained a mild strain as a result of the horse injury on August 9, 1998. (LF 60). In June of 2000, plaintiff saw Dr. Ellefson for shoulder complaints due to power washing at work, and he received an injection in his shoulder. (Tr. 476).

Plaintiff Nicholas Olvera continued to work from August 31, 1998 until August 28, 2000. During that period of time he quit his job with Murphy Farms to work for Excel

Construction, from February of 1999, until August of 1999. (Tr. 414 - 415). Plaintiff returned to Murphy Farms in August of 1999. (Tr. 472). Plaintiff was able to perform his job at Murphy Farms well, and in fact, continued to receive raises in his hourly pay rate after returning to work. (Tr. 472).

On August 28, 2000, plaintiff injured his back at work. (Tr. 422 - 433). Thereafter, he returned to Dr. Ellefson for back treatment. (Plaintiff's Exhibit 7). On September 6, 2000, Dr. Ellefson gave plaintiff work restrictions for using his back. (Plaintiff's Exhibit 7). Dr. Ellefson gave additional back restrictions on September 21, 2000. (Plaintiff's Exhibit 7). Those restrictions prevented plaintiff from performing his work at Murphy Farms, and in September of 2000, he was released from his employment. (Tr. 477).

Despite the injuries plaintiff is claiming in this case, he testified at trial that he has hunted turkey every year since the accident. (Tr. 478). Plaintiff has gone fishing since the accident, and in fact, even caught a 30 or 40 pound fish. (Tr. 480 - 482). Plaintiff has even gone 4-wheeling since the accident. (Tr. 482 - 483).

Although the majority of plaintiff's medical expenses were incurred after his work injury in August of 2000, two years after the horse accident, the total amount of medical bills claimed at trial was $21,908.27. (Plaintiff's Exhibit 25).

Respondents/plaintiffs also presented medical evidence at trial, including the deposition testimony of Dr. Brian Ellefsen. (Tr. 286 - 287). (The transcript of Dr. Ellefsen's deposition was admitted as Exhibit 13). Dr. Ellefsen testified that plaintiff suffered injuries to the discs of his lumber spine, particularly L - 4, 5 and L - 5, S - 1, as a result of being struck by a horse

on August 9, 1998. (Exhibit 13, p. 55). Dr. Ellefsen further testified that plaintiff's injuries sustained in the accident were permanent and irreversible. (Exhibit 13, p. 56). As a result of those injuries, Dr. Ellefsen believed that plaintiff lost all functions and abilities beyond the tasks of daily living, i.e., anything beyond personal hygiene, light housework, or driving a car. (Exhibit 13, pp. 56 - 57). Dr. Ellefsen provided his opinion testimony that, as a result of the accident, plaintiff Nicholas Olvera was unable to work, and was not competitive whatsoever in the open job market, and was unemployable. (Exhibit 13, pp. 57 - 58).

Deputy Van Black's Incident Report

Prior to trial, defendant filed a Motion in Limine, which requested the Court to exclude from evidence an Incident Report prepared by Deputy Don Van Black. The Motion in Limine is included in the Legal File at pages 13 - 18. The Incident Report is included in the Legal File at page 69. The Motion in Limine was argued prior to trial (Tr. 33 - 39). After hearing argument, the Court overruled the Motion in Limine, subject to a proper foundation being laid for the Incident Report. (Tr. 39).

On the second day of trial, plaintiff called Sheriff's deputy Gary Martin as a witness. (Tr. 248). Deputy Martin was asked questions about the incident report prepared by deputy Don Van Black. (Tr. 254). Deputy Martin testified that deputy Van Black was currently in the military, serving in Iraq. (Tr. 255-256). Counsel for plaintiff then introduced deputy Van Black's incident report as Exhibit 1. (Tr. 256). Counsel for defendant objected to the incident report, on the ground of hearsay, and the Court overruled the objection and allowed the incident report into evidence as Exhibit 1. (Tr. 256-257). The Court did instruct counsel for plaintiff

that the incident report should not be passed to the jury. (Tr. 257). Thereafter, plaintiff's attorney asked deputy Martin about specific statements in the incident report, including the following:

Q: The report indicates that VanBlack says he [defendant Fritts] appeared to be drunk?

A: The report does state that.

(Tr. 257, lines 24 - 25; p. 258, line 1).

Jury Instructions on Plaintiff's Failure to Yield

The jury instruction conference took place on Friday, October 31, 2003. (Tr. 617). At the conference, counsel for defendant submitted two proposed instructions marked as Exhibits "A" and "B". (Tr. 619). Instruction "A" is included in the legal file at page 78. Although instruction "B" was attached to defendant's Motion for Remittitur or for New Trial, it was inadvertently left out of the legal file. Therefore, both instructions have been attached to this brief in the appendix for the convenience of the Court. (See Appendix, pp. A32-A33). The instructions were an attempt by defendant to submit plaintiff's failure to yield as negligence for purposes of comparative fault. Instruction "A" was the verdict director, and Instruction "B" was the definition of "yield the right of way." (LF 78; Appendix, pp. A32-A33).

According to defendant Fritts, this accident occurred as he was riding his horse down the right side of the street, and plaintiff Nicholas Olvera suddenly stepped out from between two parked cars, directly into the path of defendant and his horse. (Tr. 587 - 588). The collision took place in the street. (Tr. 587 - 588).

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR REMITTITUR BECAUSE THE VERDICT OF $1,000,000 IN DAMAGES FOR PLAINTIFF NICHOLAS OLVERA WAS GROSSLY EXCESSIVE AND EXCEEDED FAIR AND REASONABLE COMPENSATION FOR THE PLAINTIFFS' INJURIES AND DAMAGES TO THE EXTENT THAT IT SHOCKED THE CONSCIENCE AND ESTABLISHED THAT BOTH THE COURT AND JURY ABUSED THEIR DISCRETION IN THAT THE MEDICAL AND OTHER EVIDENCE AT TRIAL ESTABLISHED CONCLUSIVELY THAT THE HORSE ACCIDENT ONLY CAUSED PLAINTIFF TO SUSTAIN AN AGGRAVATION OF A PREVIOUS BACK INJURY WHICH RESOLVED WITHIN ONE MONTH OF THE ACCIDENT, RESULTING IN ONLY $2,548.13 IN MEDICAL BILLS, FIVE DOCTOR'S VISITS, TEN PHYSICAL THERAPY SESSIONS, AND APPROXIMATELY $2,500 IN LOST WAGES, AND THAT PLAINTIFF WAS ABLE TO RETURN TO WORK THREE WEEKS AFTER THE ACCIDENT AND CONTINUED TO WORK FOR TWO MORE YEARS WITH LITTLE OR NO MEDICAL TREATMENT UNTIL HE RE-INJURED HIMSELF AT WORK IN AUGUST OF 2000, AND THIS SECOND INJURY IS WHAT CAUSED PLAINTIFF'S CURRENT DISABILITY.

R.S.Mo. §537.068

Henderson v. Fields, 68 S.W.3d 455, 485 (Mo.App.W.D. 2001)

POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL BECAUSE THE VERDICT OF $1,000,000 IN DAMAGES FOR PLAINTIFF NICHOLAS OLVERA WAS GROSSLY EXCESSIVE AND AGAINST THE WEIGHT OF THE EVIDENCE TO SUCH AN EXTENT THAT THE VERDICT ESTABLISHED JURY BIAS, PASSION OR PREJUDICE IN THAT THE MEDICAL AND OTHER EVIDENCE AT TRIAL PROVED CONCLUSIVELY THAT THE HORSE ACCIDENT ONLY CAUSED PLAINTIFF TO SUSTAIN AN AGGRAVATION OF A PREVIOUS BACK INJURY WHICH RESOLVED WITHIN ONE MONTH OF THE ACCIDENT, RESULTING IN ONLY $2,548.13 IN MEDICAL BILLS, FIVE DOCTOR'S VISITS, TEN PHYSICAL THERAPY SESSIONS, AND APPROXIMATELY $2,500 IN LOST WAGES, AND THAT PLAINTIFF WAS ABLE TO RETURN TO WORK THREE WEEKS AFTER THE ACCIDENT AND CONTINUED TO WORK FOR TWO MORE YEARS WITH LITTLE OR NO MEDICAL TREATMENT UNTIL HE RE-INJURED HIMSELF AT WORK IN AUGUST OF 2000, AND THIS SECOND INJURY IS WHAT CAUSED PLAINTIFF'S CURRENT DISABILITY.

Letz v. Turbomeca Engine Corp., 975 S.W.2d 155, 174 (Mo.App. W.D. 1997).

POINT III

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS AT TRIAL TO THE ADMISSION OF DEPUTY VAN BLACK'S INCIDENT REPORT BECAUSE THE INCIDENT REPORT WAS INADMISSIBLE HEARSAY IN THAT IT WAS A WRITTEN ASSERTION MADE BY DEPUTY VAN BLACK OUTSIDE THE COURTROOM, AND IN ADDITION, THE INCIDENT REPORT INCLUDED OPINIONS OF DEPUTY VAN BLACK THAT WERE MADE WITHOUT A SUFFICIENT FOUNDATION.

State es rel. Hobbs et al v. Tuckness, 949 S.W.2d 651, 653 (Mo. App. W.D. 1997).

Bynote v. National Super Markets, Inc., 891 S.W.2d 117, 120 (Mo. banc 1995).

State v. Vance, 633 S.W.2d 442, 443 (Mo. App. W.D. 1982).

State v. Barrett, 744 S.W.2d 856, 848 (Mo.App. W.D. 1988).

POINT IV

THE TRIAL COURT ERRED IN REJECTING DEFENDANT'S PROPOSED JURY INSTRUCTIONS "A" AND "B" BECAUSE THERE WAS SUBSTANTIAL EVIDENCE PRODUCED AT TRIAL TO SUPPORT DEFENDANT'S POSITION THAT PLAINTIFF NICHOLAS OLVERA FAILED TO YIELD THE RIGHT OF WAY IN THAT DEFENDANT TESTIFIED THAT THE COLLISION OCCURRED IN THE STREET AFTER PLAINTIFF STEPPED OUT FROM BETWEEN TWO CARS DIRECTLY INTO THE PATH OF DEFENDANT AND HIS HORSE, AND OTHER EVIDENCE ALSO SUPPORTED THAT SCENARIO, AND UNDER MISSOURI LAW A PERSON ON HORSEBACK IS NOT PROHIBITED FROM USING PUBLIC STREETS, AND SUCH A PERSON FITS WITHIN THE DEFINITION OF "TRAFFIC" UNDER R.S.Mo. § 300.010(38), AND THEREFORE, PLAINTIFF HAD THE DUTY TO YIELD THE RIGHT OF WAY TO DEFENDANT FRITTS.

R.S.Mo. § 300.010(38)

R.S.Mo. § 300.390

Vanneman v. Walker Laundry Co., 166 Mo.App.685, 150 S.W. 1128,1129 (Mo.App. 1912)

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR REMITTITUR BECAUSE THE VERDICT OF $1,000,000 IN DAMAGES FOR PLAINTIFF NICHOLAS OLVERA WAS GROSSLY EXCESSIVE AND EXCEEDED FAIR AND REASONABLE COMPENSATION FOR THE PLAINTIFFS' INJURIES AND DAMAGES TO THE EXTENT THAT IT SHOCKED THE CONSCIENCE AND ESTABLISHED THAT BOTH THE COURT AND JURY ABUSED THEIR DISCRETION IN THAT THE MEDICAL AND OTHER EVIDENCE AT TRIAL ESTABLISHED CONCLUSIVELY THAT THE HORSE ACCIDENT ONLY CAUSED PLAINTIFF TO SUSTAIN AN AGGRAVATION OF A PREVIOUS BACK INJURY WHICH RESOLVED WITHIN ONE MONTH OF THE ACCIDENT, RESULTING IN ONLY $2,548.13 IN MEDICAL BILLS, FIVE DOCTOR'S VISITS, TEN PHYSICAL THERAPY SESSIONS, AND APPROXIMATELY $2,500 IN LOST WAGES, AND THAT PLAINTIFF WAS ABLE TO RETURN TO WORK THREE WEEKS AFTER THE ACCIDENT AND CONTINUED TO WORK FOR TWO MORE YEARS WITH LITTLE OR NO MEDICAL TREATMENT UNTIL HE RE-INJURED HIMSELF AT WORK IN AUGUST OF 2000, AND THIS SECOND INJURY IS WHAT CAUSED PLAINTIFF'S CURRENT DISABILITY.

Standard of Review

The trial court has great discretion in approving a verdict, or in granting a request for remittitur, and the appellate courts will only interfere in that decision if the verdict is so grossly excessive that it shocks the conscience of the court and convinces the court that both the jury and the trial court abused their discretion. Willman v. Wall, 13 S.W.3d 694, 699 (Mo. App. W.D. 2000).

Argument

Defendant filed his Motion for Remittitur or for New Trial on December 8, 2003. (LF 29). The motion was argued to the Court on December 19, 2003. (Plaintiff-Appellant Olvera's Supplemental Record on Appeal - Transcript). The trial court denied defendant's Motion for Remittitur on that same date. (Plaintiff-Appellant Olvera's Supplemental Record on Appeal - Transcript, p. 20).

R.S.Mo. §537.068 states in part:

> A court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages.

The Missouri Court of Appeals has stated that where the jury errs by awarding a verdict which is simply too excessive under the evidence, injustice may be prevented by ordering a

remittitur. Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439, 448 (Mo. banc 1998).

In Henderson v. Fields, 68 S.W.3d 455, 485 (Mo. App. W.D. 2001) the Court of Appeals stated that when reviewing a trial court's decision to deny remittitur, the appellate court's review should be guided by the following principles. First, the assessment of damages is primarily the function of the jury. Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439, 448 (Mo. banc 1998). A trial court has great discretion in approving a verdict or setting it aside as excessive. Letz v. Turbomeca Engine Corp., 975 S.W.2d 155, 174 (Mo. App. W.D. 1997). An appellate court should only interfere when the verdict is so grossly excessive that it shocks the conscience of the court, and convinces the court that both the jury and the trial court abused their discretion. Id., (quoting Fust v. Francois, 913 S.W.2d 38, 49 (Mo. App. E.D. 1995)).

The jury in this case found that plaintiff Nicholas Olvera was damaged in the total amount of One Million dollars, which was reduced by 20% for the assessment of fault to Mr. Olvera, for a net verdict of $800,000. The verdict of One Million was so completely unreasonable and excessive that it shocks the

conscience, and the trial court abused its discretion in denying defendant's Motion for Remittitur.

The incident giving rise to plaintiff's injuries was a horse collision, which occurred on August 9, 1998. It was an accident arising from an emergency medical situation. There was no intent on the part of defendant Fritts to injure plaintiff Nicholas Olvera. After the collision, plaintiff was able to get to his feet, and in fact was able to walk some distance to the area where another person had fallen off a horse. It is undisputed that plaintiff did not sustain one single broken bone or fracture. His injuries were not life threatening or disabling. Plaintiff refused medical treatment at the scene of the accident, and rejected the offer of an ambulance. Instead, plaintiff drove himself to the Cedar County Memorial Hospital in El Dorado Springs.

The medical records from the Cedar County Memorial Hospital were admitted into evidence at trial as Plaintiff's Exhibit 7, and are also included in the Legal File beginning at page 43. According to the emergency room report, plaintiff complained of a right lip laceration, a laceration to his right elbow, and soreness to his right arm, back and buttocks. Plaintiff's back

complaints were so minor that the doctors did not even order an x-ray. The doctors did order x-rays of the left ribs and chest, which were negative.

The emergency room doctor, Rick Casey, D.O., testified that he treated plaintiff in the emergency room on August 9, 1998. (See Exhibit 11, Deposition of Dr. Casey, beginning on p. 7). Plaintiff's only complaints in the emergency room were of a laceration to his right upper lip, his right elbow was sore, his back was sore, and his buttocks were sore. The only treatment given in the emergency room was repair of the laceration with two stitches, and a prescription of Ultram for plaintiff's discomfort. A neurologic assessment was completely normal. (Exhibit 11, p. 16). Plaintiff was not confused, disoriented, did not have slurred speech, and was not knocked unconscious as a result of the horse accident. Dr. Casey's only diagnosis was a laceration to the upper lip with a left rib strain, and a bruise. Dr. Casey did not indicate or diagnose any back injury whatsoever. (Exhibit 11, p. 17).

Plaintiff visited Dr. Garwood at the Nevada Medical Clinic two days later, on August 11, 1998. (Medical records from the Nevada Medical Clinic were admitted into evidence at trial as Plaintiff's Exhibit 7, and are also included in the Legal File beginning at page 48). Dr. Garwood ordered x-rays of the lower back, and also ordered a bone scan, which was performed on August 20, 1998. The x-ray revealed that plaintiff had "moderate degenerative spondylosis of the mid and lower lumbar spine" but

was otherwise negative. The bone scan was negative for any fracture or other acute injury.

Plaintiff returned to Dr. Garwood on August 25, 1998, and told the doctor that his back felt much improved at that time. Dr. Garwood ordered plaintiff to undergo physical therapy for work hardening/strengthening exercises. The next visit to Dr. Garwood was on August 31, 1998, where plaintiff reported he was still improving. Dr. Garwood allowed plaintiff to return to work with a weight lifting restriction of 10 to 15 pounds. Dr. Garwood's notes from that date indicate that plaintiff was "convalescing satisfactorily from his injuries."

Plaintiff next saw Dr. Garwood on September 8, 1998. At that time plaintiff indicated that the physical therapy was helping. On September 15, 1998, plaintiff saw Dr. Garwood again. On that date, plaintiff advised Dr. Garwood that he had "improved to such an extent the he will be able to work at Murphy Farms without difficulty."

Plaintiff went through physical therapy from August 26, 1998 through September 14, 1998, for a total of ten sessions. According to the Physical Therapy Discharge Summary, all goals were met.

The evidence set forth above and the other medical evidence at trial, established that as of September 15, 1998, about five weeks after the horse accident, plaintiff had returned to work without any restrictions. His physical therapy was completed, and all goals were met. Plaintiff himself stated that he was ready to go back to work, and did not believe he would have any problems at work. All x-rays and other diagnostic tests of his lower back were negative, except for some pre-existing degenerative problems. More importantly, plaintiff did not seek any additional medical treatment for his lower back until five months later on February 8, 1999, when he showed up at Dr. Garwood's office asking for a disability determination. In fact, during the 12 months after September 15, 1998, plaintiff had only three doctor's appointments with regard to his lower back, and all three were related to requests for disability, and not for actual treatment.

As for medical bills, plaintiff introduced trial Exhibit No. 25, entitled "Medical Expenses and Damages Report." As of September 15, 1998, the total amount of plaintiff's medical bills was only $2,548.13.

Plaintiff is also claiming that he was off work from August 10, 1998, until August 31, 1998. In addition, he is claiming that he missed work for physical therapy, for a total claim of 34.5 missed days of work. The total amount of plaintiff's lost wages claim was $2,539.20. (See Plaintiff's Exhibit 26).

This evidence established conclusively that as of September 15, 1998, plaintiff had recovered fully from the injuries he received in the horse accident. His medical treatment was completed. He was back to work full time with no restrictions. The jury's verdict of $1 Million was grossly excessive for one month of medical treatment, approximately $2,500 in medical bills, and $2,500 in lost wages.

However, even if the medical treatment which occurred over the next two years was considered, the jury's verdict was still grossly excessive. In the year 1999, plaintiff only had four medical treatments, two of which involved no treatment, only requests for disability. There was no medical treatment whatsoever in January 1999. On February 8, 1999, plaintiff saw Dr. Garwood, for a disability determination, but received no treatment. (LF 57). Plaintiff did not see any doctors or receive any other medical treatment in March, April, May or June of 1999. On July 26, 1999, plaintiff visited Dr. Casey, but only for a disability determination. (See plaintiff's exhibit 11, deposition of Dr. Casey, p. 19). On that date, plaintiff wasn't even on any medication for his alleged back complaints. Plaintiff did not see any doctors or receive any other medical treatment in August, September or November of 1999. On December 22, 1999, plaintiff saw Dr. Garwood with back complaints, but also stated that he had no problems during work, and that his back symptoms didn't bother him until after work. (LF 57).

Plaintiff did not see any doctor or seek any medical treatment for injuries sustained in the horse accident in January, February, March or April of 2000. On May 23, 2000, he visited Dr. Garwood to complaint about a worker's compensation injury. (LF 60). Dr. Garwood did not believe that plaintiff sustained a worker's compensation injury, and instead, believed that plaintiff had only sustained a mild strain as a result of the horse injury on August 9, 1998. In June of 2000, plaintiff saw Dr. Ellefson for shoulder complaints due to power washing at work, and he received an injection in his shoulder. (Tr. 476). However, Dr. Ellefson testified at trial that the shoulder injury was not related to the horse accident.

It is also extremely important to note that plaintiff Nicholas Olvera continued to work from the date he returned to work on August 31, 1998, until August 28, 2000. During that period of time he quit his job with Murphy Farms to work for Excel Construction, from February of 1999, until August of 1999. (Tr. 414 - 415). Plaintiff returned to Murphy Farms in August of 1999. (Tr. 472). Plaintiff was able to perform his job at Murphy Farms well, and in fact, continued to receive raises in his hourly pay rate after returning to work. (Tr. 472).

On August 28, 2000, more than two years after the horse accident, plaintiff injured his back at work. (Tr. 422 - 433). Shortly thereafter, he returned to Dr. Ellefson for back treatment. (Plaintiff's Exhibit 7). On September 6, 2000, Dr. Ellefson gave plaintiff work restrictions for using his back. Dr. Ellefson gave additional back restrictions on September 21, 2000. These restrictions prevented plaintiff from performing his work at Murphy Farms, and in September of 2000, he was released from his employment. (Tr. 477).

Other facts this court should consider are that despite the injuries plaintiff is claiming in this case, he testified at trial that he has hunted turkey every year since the accident. (Tr. 478). Plaintiff continues to go fishing since the accident, and in fact, even caught a 30 or 40 pound fish while "snagging." (Tr. 480 - 482). Plaintiff admitted that he has operated a 4-wheeler since the accident. (Tr. 482 - 483).

Although the majority of plaintiff's medical expenses were incurred after his work injury in August of 2000, two years after the horse accident, the total amount of medical bills claimed at trial was $21,908.27. (Plaintiff's Exhibit 25).

The obvious conclusion from the evidence set forth above is that plaintiff sustained a minor injury in the horse accident, that had fully resolved within five weeks. After September 15, 1998, plaintiff did not receive any treatment for his back until May of 2000, 21 months after the accident. Then, in August of 2000, slightly more than two years after the accident, plaintiff re-injured himself at work. After that second injury, he continued with medical treatment for his back, and received work restrictions related to his back for the first time since August of 1998, and eventually had to quit his job. Those facts establish conclusively that the horse accident injury did not support a verdict in the amount of $1,000,000. Even if the jury did believe that all of plaintiff's medical treatment was

related to the horse accident, the total amount of medical bills was only $21,908.27. Even that amount was insufficient to support the jury's verdict.

Plaintiff will most likely argue that his economic expert's testimony was sufficient to support the size of the verdict. However, before that testimony had any relevance, the jury had to believe that plaintiff was totally disabled. Plaintiff did not prove he was disabled. In order to prove that plaintiff was totally disabled, and that he could not work at any occupation, plaintiff needed a vocational rehabilitation expert. Dr. Ellefsen was not qualified to testify that plaintiff was unable to work in any occupation. Moreover, if plaintiff was disabled, it was due to the second injury which occurred in August of 2000, two years after the horse accident. It simply makes no sense for the jury to believe that plaintiff was disabled due to the horse accident, when he returned to work 21 days after the accident, and continued to work full time for the next two years until he sustained a second injury at work. He did not have any back restrictions at work during those two years. However, after the second injury, plaintiff was given back restrictions, and had to quit his job. Clearly, any disability was caused by

the second injury. As a result, the jury's award of $1 Million was grossly excessive, and the trial court abused its discretion in denying defendant's motion for remittitur.

POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL BECAUSE THE VERDICT OF $1,000,000 IN DAMAGES FOR PLAINTIFF NICHOLAS OLVERA WAS GROSSLY EXCESSIVE AND AGAINST THE WEIGHT OF THE EVIDENCE TO SUCH AN EXTENT THAT THE VERDICT ESTABLISHED JURY BIAS, PASSION OR PREJUDICE IN THAT THE MEDICAL AND OTHER EVIDENCE AT TRIAL PROVED CONCLUSIVELY THAT THE HORSE ACCIDENT ONLY CAUSED PLAINTIFF TO SUSTAIN AN AGGRAVATION OF A PREVIOUS BACK INJURY WHICH RESOLVED WITHIN ONE MONTH OF THE ACCIDENT, RESULTING IN ONLY $2,548.13 IN MEDICAL BILLS, FIVE DOCTOR'S VISITS, TEN PHYSICAL THERAPY SESSIONS, AND APPROXIMATELY $2,500 IN LOST WAGES, AND THAT PLAINTIFF WAS ABLE TO RETURN TO WORK THREE WEEKS AFTER THE ACCIDENT AND CONTINUED TO WORK FOR TWO MORE YEARS WITH LITTLE OR NO MEDICAL TREATMENT UNTIL HE RE-INJURED HIMSELF AT WORK IN AUGUST OF 2000, AND THIS SECOND INJURY IS WHAT CAUSED PLAINTIFF'S CURRENT DISABILITY.

Standard of Review

A new trial is required when jury bias and prejudice results in an excessive verdict. Letz v. Turbomeca Engine Corp., 975 S.W.2d 155, 174 (Mo.App. W.D. 1997). The size of the verdict alone cannot establish jury bias, passion or prejudice, and the complaining party must establish that the verdict, when viewed in the light most favorable to the prevailing party, was

glaringly unwarranted, and that some trial error or misconduct of the prevailing party was responsible for prejudicing the jury. Willman v. Wall, 13 S.W.3d 694, 699 (Mo.App. W.D. 2000) (quoting Letz v. Turbomeca Engine Corp., 975 S.W.2d 155, 174 (Mo.App.W.D. 1997)).

As for the argument that the verdict was against the weight of the evidence, the trial court has broad discretion, and the trial court's decision will not be disturbed unless it manifestly abused its discretion. McCormack v. Capital Electric Construction Company, Inc., 35 S.W.3d 410, 413 (Mo.App. W.D. 2000). Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances before the court, and the trial court's decision is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. Id. at 414. No abuse of discretion will be found where substantial evidence exists to support the verdict. Id.

Argument

The trial court also erred in failing to grant defendant's Motion for New Trial. For the same reasons set forth under Point I regarding remittitur, the amount of the verdict was so grossly excessive and against the weight of the evidence that it shocked the conscience. The trial court's failure to grant the motion for new trial was against the logic of the evidence before the court at trial, and was so arbitrary and unreasonable as to shock the sense of justice and to indicate a lack of careful consideration. Defendant will not repeat those

arguments here, but instead, incorporates the argument set forth under Point I as though fully set forth herein.

POINT III

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS AT TRIAL TO THE ADMISSION OF DEPUTY VAN BLACK'S INCIDENT REPORT BECAUSE THE INCIDENT REPORT WAS INADMISSIBLE HEARSAY IN THAT IT WAS A WRITTEN ASSERTION MADE BY DEPUTY VAN BLACK OUTSIDE THE COURTROOM, AND IN ADDITION, THE INCIDENT REPORT INCLUDED OPINIONS OF DEPUTY VAN BLACK THAT WERE GIVEN WITHOUT A SUFFICIENT FOUNDATION.

Standard of Review

The decision of the trial court as to the admissibility of evidence is given substantial deference on appeal and will not be disturbed unless the trial court has abused its discretion. In re the Estate of Daly, et al. v. Hill Haven Corp., 907 S.W.2d 200, 204 (Mo.App. W.D. 1995).

Argument

During the trial of this case, the Court allowed the plaintiffs to enter into evidence an Incident Report prepared by sheriff's deputy Don Van black. The Incident Report is included in the Legal File at page 68. The Incident Report states as follows:

Bates County Sheriff's Department

108 E. Ft. Scott St.

Butler, Mo. 64730

Rockville Festival Injury

8/9/98

On 9/8/98 at 1:00 am Deputy Gary Martin and I were at the east end of the dance area when we noticed Kelly Frits [sic] ride up to the fenced off area. He then dismounted his horse (he appeared to be drunk) and told us that a woman had been thrown from a horse near the grain elevator.

As I walked toward the area, a Nichols [sic] Olvera stopped me. He told me that the man on the horse just ran him down and did not stop. Mr. Olvera was bleeding from the mouth, nose, and his elbow. He also had mud on the back of his shirt.

I asked if he had serious injuries? He said that he did not think so. I asked him to sit down. I then summoned the Bates County Ambulance for the injured female, and reserve deputies Kelly Phillips and Brad McGuire (Medics).

After the medics checked the female I asked Kelly Phillips to check Mr. Olvera. He was advised to get medical treatment. The people with him were concerned about taking him to the hospital because Mr. Olvera was the only one in the party that was not drinking. Mr. Olvera said that he would be able to drive.

Before the Ambulance arrived to aid the injured woman, Deputy Martin and I returned to Main Street to provide security at the dance.

End Report

Don Van Black

8/10/98

Counsel for defendant Fritts objected to the Incident Report on the ground that it was hearsay. (Tr. 256). The objection was overruled, and the Court allowed the Incident Report into evidence. (Tr. 256 - 257). It is important to note that the author of the Incident Report, deputy Van Black, was unavailable to appear at trial because he was in the military, stationed in Iraq. (Tr. 255 - 256). Counsel for plaintiff then proceeded to question deputy Martin about the report, and asked the following question:

> Q: The report indicates that VanBlack says he [defendant Fritts] appeared to be drunk?
>
> A: The report does state that.

(Tr. 257, lines 24 - 25; p. 258, line 1).

Hearsay evidence is defined as an out-of-court statement offered in evidence to prove the matter asserted therein. State ex rel. Hobbs et al v. Tuckness, 949 S.W.2d 651, 653 (Mo.App. W.D. 1997). The purpose of the rule excluding hearsay evidence is to ensure that documents admitted in evidence are trustworthy by giving the party against whom the documents are offered the opportunity to cross-examine the preparer or proper custodian of the documents. Id.; See also; Bynote v. National Super Markets, Inc., 891 S.W.2d 117, 120 (Mo. banc 1995).

The Incident Report was clearly hearsay. It was a written statement, made out of court, offered into evidence to prove the truth of the matters contained therein. Therefore, the

Incident Report should not have been admitted into evidence, unless an exception to the hearsay rule applied.

Plaintiffs argued at trial that the Business Records exception to the hearsay rule applied, as set forth in R.S.Mo. § 490.680. That statute states as follows:

> **490.680. Records, competent evidence, when**
>
> A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information method and time of preparation were such as to justify its admission.

First, it is well established under Missouri law that the Business Records Act does not make all records competent evidence regardless of by whom, in what manner, or for what purpose they were compiled or offered. State v. Vance, 633 S.W.2d 442, 443 (Mo.App. W.D. 1982). Qualification under the Act does not allow the admission of evidence which would not be admissible if offered in person. Id.

In this case, the Incident Report would not have been admissible even if Deputy Don Van Black had been available and present at trial to testify. In particular, the portion of the Incident Report where Deputy Van Black stated that defendant Fritts appeared to be intoxicated was inadmissible because the statement was a conclusion, and an opinion, without the necessary foundation. There was no evidence whatsoever that Deputy Van Black was qualified to make such a conclusory statement. There was no evidence as to what Deputy Van Black observed

about defendant Fritts to arrive at that conclusion. There was no evidence whatsoever to support Deputy Van Black's opinion. Since Deputy Van Black was not available to testify at trial, defendant was not able to cross examine Deputy Van Black to test his opinion.

Under Missouri law, even a lay person is allowed to give an opinion on the intoxication of another person. State v. Edmonds, 468 S.W.2d 685, 688 (Mo.App. 1971). However, the opinion must be preceded or at least supported by the evidentiary facts of conduct or appearance upon which the witness based his opinion. Id. That same requirement of evidence showing the conduct or appearance upon which the opinion of intoxication also applies where the witness is a police officer. State v. Barrett, 744 S.W.2d 856, 858 (Mo.App. S.D. 1988).

In this case, there was no evidence as to what facts, conduct, or other evidence supported Deputy Van Black's opinion that defendant Fritts appeared intoxicated. Therefore, the opinion should not have been permitted, even if the Incident Report was qualified under the Business Records Act. Deputy Van Black's opinion was hearsay, despite the act, and the court erred in allowing its admission into evidence. State v. Vance, 633 S.W.2d 442, 443 (Mo.App. W.D. 1982).

Furthermore, plaintiff did not lay the necessary foundation for the report to qualify it as a business record under R.S.Mo. § 490.680. As set forth above, that statute requires the following proof:

1. Testimony from the records custodian or other qualified witness;

2. Proof as to the document's identity and the mode of its preparation;

3. Proof that the document was made in the regular course of business;

4. Proof that the document was made at or near the time of the act, condition or event mentioned therein; and

5. A finding by the court that the sources of information, and method and time of preparation were such as to justify the document's admission.

The witness who allegedly qualified the report at trial was Deputy Gary Martin. Deputy Martin admitted that he was not the custodian of the Incident Report. (Tr. 254, lines 19 - 23). He did not testify that the Incident Report was made in the regular course of business of the Bates County Sheriff's Department. Furthermore, there was no proof whatsoever for the court to form an opinion that the sources of information, method and time of preparation, were such to justify the document's admission. As a result, plaintiff did not lay the foundation required by the statute, and the Incident Report should not have come into evidence. The admission of the Incident Report was an abuse of discretion by the court. It was clearly hearsay, and presented all the problems that are naturally caused by the admission of hearsay information at trial. The jury was allowed to hear a statement from Deputy Van Black, that defendant Fritts appeared intoxicated, without defendant having any opportunity whatsoever to cross-examine or otherwise test that opinion. The jury was allowed to hear Deputy Van Black's opinion that defendant Fritts appeared to be intoxicated, without hearing any evidence whatsoever as to why Deputy Van Black held that opinion, and without hearing any evidence whatsoever as to the facts or conduct or other information upon which the opinion was based. Obviously, the opinion of a law enforcement officer as to the intoxication of defendant Fritts was important

to the jury, and defendant was severely prejudiced by the admission of Deputy Van Black's hearsay opinion.

POINT IV

THE TRIAL COURT ERRED IN REJECTING DEFENDANT'S PROPOSED JURY INSTRUCTIONS "A" AND "B" BECAUSE THERE WAS SUBSTANTIAL EVIDENCE PRODUCED AT TRIAL TO SUPPORT DEFENDANT'S POSITION THAT PLAINTIFF NICHOLAS OLVERA FAILED TO YIELD THE RIGHT OF WAY IN THAT DEFENDANT TESTIFIED THAT THE COLLISION OCCURRED IN THE STREET AFTER PLAINTIFF STEPPED OUT FROM BETWEEN TWO CARS DIRECTLY INTO THE PATH OF DEFENDANT AND HIS HORSE, AND OTHER EVIDENCE ALSO SUPPORTED THAT SCENARIO, AND UNDER MISSOURI LAW A PERSON ON HORSEBACK IS NOT PROHIBITED FROM USING PUBLIC STREETS, AND SUCH A PERSON FITS WITHIN THE DEFINITION OF "TRAFFIC" UNDER R.S.Mo. § 300.010(38), AND THEREFORE, PLAINTIFF HAD THE DUTY TO YIELD THE RIGHT OF WAY TO DEFENDANT FRITTS.

Standard of Review

Whether or not a jury was properly instructed is a matter of law. UXA by and through UXA, et al v. Marconi, 128 S.W.3d 121, 132 (Mo.App. E.D. 2003). This court's review of a trial court's refusal to give jury instructions is under an abuse of discretion standard. Linton v. Mo. Highway & Transp. Comm'n, 980 S.W.2d 4, 10 (Mo.App. E.D. 1998); Care and Treatment of Wadleigh v. State, (Slip Opinion, Missouri Court of Appeals, Western District, WD # 62029, filed June 29, 2004, Available on Westlaw, 2004 WL 1439641).

Argument

During the jury instruction conference, counsel for defendant submitted two jury instructions in an attempt to submit the issue of plaintiff's failure to yield the right-of-way. (Tr. 619). The two instructions were from M.A.I. Sixth Edition. Instruction "A" was defendant's verdict director, submitting fault on the part of plaintiff for plaintiff's failure to keep a careful lookout, and plaintiff's failure to yield. Instruction "B" was the definition of "yield the right of way." The instructions were as follows:

INSTRUCTION NO. A

In your verdict you must assess a percentage of fault to plaintiff Nicholas Olvera, whether or not defendant Fritts was partly at fault, if you believe:

First, either:

Plaintiff Nicholas Olvera failed to keep a careful lookout, or

Plaintiff Nicholas Olvera failed to yield the right of way, and

Second, plaintiff Nicholas Olvera, in any one or more of the respects submitted in paragraph First was thereby negligent, and

Third, such negligence of plaintiff Nicholas Olvera directly caused or directly contributed to cause any damage plaintiff Nicholas Olvera may have sustained.

M.A.I. 17.02 [1980 Revision]; M.A.I. 17.05 [1965 New]; M.A.I. 17.08 [1965 New]; M.A.I. 19.01 [1986 Revision]; M.A.I. 37.02 [1986 New]

Submitted by defendant

INSTRUCTION NO. B

The phrase "yield the right-of-way as used in these instructions means that a pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection is required to yield to all traffic upon the roadway.

Not in M.A.I. § 4-17

Submitted by defendant.

The trial court rejected both of the instructions, and would not allow defendant to submit plaintiff's failure to yield the right of way as comparative fault. Defendant was still allowed to submit plaintiff's failure to keep a careful lookout.

Whether or not a jury was correctly instructed is a matter of law. UXA by and through UXA, et al v. Marconi, 128 S.W.3d 121, 132 (Mo.App. E.D. 2004). Before an instruction can be given to the jury, the issue submitted in the instruction must be supported by substantial evidence from which the jury reasonably could find such an issue. Id. It is proper to give an instruction upon any theory that is supported by the evidence. Id. In determining whether adequate support exists in the record, the appellate court must review the evidence in the light most favorable to the proponent of the instruction, giving the proponent the benefit of all reasonable inferences and disregarding evidence to the contrary. French v. Missouri Highway and Transp. Comm'n, 908 S.W.2d 146, 150 (Mo.App. W.D. 1995).

In this case, there was substantial evidence to support a submission of fault against plaintiff for his failure to yield the right of way. There was clear testimony from defendant Fritts that the accident occurred in a public street, where defendant was lawfully riding his

horse. According to defendant Fritts, the plaintiff stepped out from between two parked cars, and he was not within a crosswalk.

Plaintiffs' primary argument in opposition to the instructions was that the law does not give a horse and rider the right of way. Defendant submits that plaintiffs are incorrect, and the court abused its discretion in rejecting the instructions.

The applicable statutes are set forth at R.S.Mo. § 300.010 et. seq. It is important to note that there is no statute which prohibits a rider on horseback from riding on a city street. Therefore, defendant Fritts had a right to ride his horse in the street. Moreover, defendant Fritts, riding on horseback, fit within the definition of "traffic" as set forth in the Missouri Model Traffic Ordinances, as set forth at R.S.Mo. § 300.010(38) as follows:

> **"Traffic,"** pedestrians, ridden or herded animals, vehicles, street cars and other conveyances, either single or together while using any highway for purposes of travel.

Since defendant Fritts and his horse were riding on the street lawfully, defendant Fritts and his horse had the right of way with regard to a pedestrian who was not on the street lawfully. It is clear that pedestrians are not allowed to cross the street in any location except for a crosswalk.

R.S.Mo. § 300.375.2 states:

> No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield.

In addition, R.S.Mo. § 300.390 states:

> Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.

The definition of "right of way" is also set forth in Not in M.A.I. 4-17 as follows:

> The phrase "yield the right-of-way as used in these instructions means that a pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection is required to yield to all vehicles upon the roadway.

The use of this definition was approved by the court of appeals in Venable v. S.O.R., Inc., 713 S.W.2d 37, 40 (Mo.App. W.D. 1986), and Biever v. Williams, 755 S.W.2d 291, 295 (Mo.App. W.D. 1988).

Defendant concedes that the statutes and not-in-M.A.I. instruction use the word "vehicle" as opposed to "traffic." The definition of the word "vehicle" does not include horses, or a horse and rider. See R.S.Mo. § 300.010(41). However, it is the position of defendant that the intent of the statutes is to prohibit a pedestrian from crossing the street in any area outside a crosswalk and to yield the right-of-way to traffic, regardless of whether there are vehicles in the street, or any other moving object. The only reason the word "vehicle" is used, is because a horseback rider on a city street is such a rare occurrence in modern society. There are areas in Kansas City like the Plaza area, and in other large cities like Central Park in New York, where horse and buggy are commonly on the streets. Certainly, the laws which require

pedestrians to use a crosswalk and yield the right-of-way would apply in a situation where a pedestrian was hit by a horse and carriage.

There are older cases, which were decided before the age of the automobile, which do require pedestrians to yield to horse drawn carriages. In Groom v. Kavanagh, 97 Mo.App. 362, 71 S.W. 362, 365 (Mo.App. 1902), the court stated that: "[A] foot passenger, when crossing a traveled thoroughfare of a city, must use ordinary care to avoid injury by horses and vehicles." In Vanneman v. Walker Laundry Co., 166 Mo.App. 685, 150 S.W. 1128,1129 (Mo.App. 1912), the court stated:

> Every one while traveling on a street is required to exercise ordinary care so that he may not interfere with its reasonable use by other travelers. In populous cities like Kansas City where people are passing upon the streets in all kinds of vehicles, on foot and on horseback, a person is required to be on the lookout to prevent collisions.

As can be seen, under the common law of Missouri, a pedestrian has a duty to exercise ordinary care when crossing the street, and to be on the lookout for riders on horseback. That means that a pedestrian, like plaintiff Nicholas Olvera in this case, must yield to a rider on horse back who is lawfully in the street.

The law of Missouri requires pedestrians to use a crosswalk when crossing the street, and to yield to vehicles in the street. While the definition of "vehicle" does not include a horseback rider, the law does not prohibit a horseback rider from using a city street, and in fact, the definition of "traffic" specifically includes a rider on horseback. Old cases in Missouri require a pedestrian to be on the lookout for horseback riders in the street. Therefore, there

is authority which requires a pedestrian to yield to a horseback rider in the street. As a result, the defendant's instructions "A" and "B" should have been given.

Defendant was severely prejudiced as a result of the court's refusal to give the instructions. If the jury had understood that plaintiff was required to yield to defendant, they certainly would have assessed plaintiff more fault. Without those instructions, the jury could have easily believed that defendant Fritts did not have the right-of-way, or that he was doing something wrong by riding his horse on a public street.

CONCLUSION

Appellant requests that this case be remanded for remittitur, or in the alternative, that appellant be given a new trial, with instructions to the trial court that the Incident Report be excluded from evidence, and that appellant be allowed to submit failure to yield the right-of-way as comparative fault on the part of plaintiff Nicholas Olvera.

Respectfully Submitted,

FRANKE, SCHULTZ & MULLEN, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Substitute Brief of Appellant-Cross Respondent Kelly Fritts, along with a copy of this Certificate of Mailing, were mailed this ___ day of April, 2005, to:

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RULE 84.06(c) CERTIFICATION

The undersigned counsel hereby certifies that this brief includes the information required by Rule 55.03, and that this brief complies with the limitations contained in Rule 84.06(b). This brief contains 13,956 words counted using Corel WordPerfect 10. Counsel also certifies that the attached floppy disk containing this brief has been scanned viruses and is virus-free.

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